

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska)	Application No. NUSF-26
Public Service Commission, on its own)	Progression Order No. 5
Motion, Seeking to Establish a Long-term)	
Universal Service Funding Mechanism)	

POST HEARING BRIEF OF
CITIZENS TELECOMMUNICATIONS COMPANY OF NEBRASKA
d/b/a FRONTIER COMMUNICATIONS OF NEBRASKA

The Nebraska Public Service Commission (“Commission”) opened this proceeding to investigate the establishment of a long-term universal service support mechanism in compliance with the Nebraska Telecommunication Universal Service Fund Act. On June 29, 2004, the Commission issued Progression Order No. 5, Application No. NUSF-26 (“Progression Order No. 5”). The Commission solicited comments, requested testimony and conducted a hearing on Progression Order No. 5 on August 25 and 26, 2004 (“Hearing”). Based on the prefiled testimony filed on behalf of the Commission Staff and other witnesses, as well as the live testimony of the witnesses at the Hearing, Frontier’s Post-Hearing Brief focuses on the eligibility criteria applicable to Nebraska ETCs seeking to receive NUSF funding, including allowing companies to use alternative NUSF- EARN calculation methodologies to determine carrier eligibility for NUSF support under the new NUSF program.

I. Existing Nebraska ETCs Should Retain Their ETC Designation Under the New NUSF Program.

Existing Nebraska ETCs should retain their ETC designation under the new NUSF program. Under the Staff’s current proposal for implementing the new NUSF program, telephone companies that are currently designated as a Nebraska ETC would retain that

designation and remain eligible for NUSF support under the new NUSF program regardless of whether the carrier is currently receiving NUSF support. The Commission explained:

14. The Commission initially proposes the network of the current Incumbent Local Exchange Carriers ("ILEC") be designated as the networks eligible to receive Program support in each support area. Other carriers may petition the Commission to change this designation subject to the necessary criteria discussed below.

Progression Order No. 5 at 14.

At the Hearing, Mr. Jeff Pursley explained further that the ILEC would retain its NETC designation and eligibility under the new NUSF funding program despite the fact that the carrier may not currently be receiving NUSF funding under the existing transition NUSF program. Mr. Pursley testified:

- A. **Mr. Pursley: There has been some concerns brought up on what happens if a company doesn't end up drawing -- say they don't comply with some of the pricing benchmarks or other things and they lose that designation. No, I don't believe -- It would not be my recommendation that they would lose that designation simply because they did not draw support. That designation would maintain, you know -- For example, there are three companies today, three or four companies today that do not draw NUSF support. Again, it would be our proposal that initially they be designated as the eligible network. They may not get support because they haven't complied with some other things, but their network would be designated as an eligible network.**

August 25, 2004 Transcript pages 42-43, lines 24-25, 1-11. Mr. Pursley also clarified that even if an incumbent LEC that is designated as an Nebraska ETC is currently not receiving NUSF support, that ILEC would remain an Nebraska ETC and be eligible for NUSF support under the new NUSF program:

- Q. Mr. Saville: As I understood your summary, you indicated that the existing incumbent ETC would be ETC for NUSF purposes at the start of this new NUSF mechanism.
- A. **Mr. Pursley: The incum- -- probably -- I believe anybody that currently receives support, because there are, I believe, three UNE-P CLECs that**

receive support as well, but I think all of those -- the ILECs and those three CLECs would carry forward as being able to receive support under the current proposal that the Commission has, as of the adoption of this Order.

Q. Mr. Saville: Thank you. Just to clarify, though, it's not an incumbent carrier that's necessarily receiving support, because I think I heard you testify that there are three or four incumbent local exchange carriers, that for whatever reasons, aren't receiving any Nebraska Universal Support funding?

A. **Mr. Pursley: That's correct. There are some -- just simply receiving the designation does not automatically mean you receive support. There are additional standards you have to comply with.**

Q. Mr. Saville: So, for example, my company, Citizens is currently not receiving any Nebraska Universal Service Fund support, but we would be designated as the NETC at the start of this new --

A. **Mr. Pursley: Correct, in your ILEC territories. That's the proposal.**

August 25, 2004 Transcript pages 86-87, lines 19-25, 1-19. The Commission should adopt Staff's recommendation in its next NUSF 26 Order and explain that existing Nebraska ETCs would retain their ETC designation and be eligible for NUSF support under the new NUSF program regardless of whether the NETC is or has previously received NUSF support.

II. Competitive Carriers Seeking NUSF Funding Under the New NUSF Program Should be Subject to All Applicable NETC Eligibility Requirements and the Same Earnings Requirements as ILECs.

The Commission has determined that the newly implemented NUSF Program will support a single network. The Commission explained:

12. Therefore, the Commission proposes the Program support a single network within a given support area. The Commission does not believe it to be in the public interest for the Fund's Program to support multiple networks within a given support area, due to the cost involved and the related impact on customers within the state. The Commission further believes the goals of the NUSF Act are best met through this proposal.

Progression Order No. 5 at 12. However, Commission Staff has recommended that any company, including facilities based CLECs and wireless providers, may file a petition with the

Commission seeking NETC designation and NUSF funding. Pursley, August 25, 2004

Transcript at pages 42-43. Under the Staff's proposal, the competitive ETC would be subject to the ETC criteria included in the Commission's rules. The Commission would evaluate these competitive ETC requests on a case-by-case basis.

Similarly the competitive ETC should be subject to the Commission's NUSF eligibility requirements. First, the competitive ETC should be subject to the same retail benchmark rate requirements as an incumbent carrier's receiving NUSF funding. If the residential benchmark rate remains at \$17.50, competitive ETCs should be required to price their services at or above this benchmark to be eligible for NUSF support.

In addition, competitive ETCs should be subject to the same earnings obligations as incumbent LECs. Commission Staff has explained that a competitive ETC would be required to file a NUSF-EARN form before the carrier would be eligible for NUSF support. Pursley, August 25, 2004 Transcript at page 94. This earnings calculation will require wireless and other CLECs to provide earnings information under a uniform accounting mechanism. Wireless providers are not subject to USOA accounting rules and CLECs are very loosely regulated for purposes of telecommunications regulation accounting. It is not clear that an earnings test can be consistently applied to existing and future NETCs. For example, Mr. Pursley indicated that unlike ILECs, there may be scenarios in which a competitive ETC would not be subject to the Commission's 12 percent earning limitation and would be eligible for NUSF support regardless of their earnings levels.

Q. Mr. Saville: Again, and maybe this is what your answer was, but just to clarify, so the competitive ETC would be subject to the earnings cap limitations that the incumbent ETC is subject to.

A. **Mr. Pursley: Certainly on a facilities basis they would be. Whether on the UNE-loop basis they are or not, the assumptions that we have made to date**

on the UNE-loop basis is that the cost of the competitive company, since they are based on the cost of the -- or substantially based on the cost of the ILEC are the same, so we've just used -- we've not done that, because the support that the CLEC gets is based on the EARN form filed by the incumbent today. I'm not saying that we're going to continue that in the future, but that certainly, with respect to a facilities-based provider, we would have an EARN form. I think that's an open issue for the question on whether UNE-loop CLECs would have the same standard.

Q. Mr. Saville: Again, I apologize, but I'm beating a dead horse here, but I just -- I want to understand. So there is potentially a scenario where a CLEC, or a competitive ETC would not be subject to the Commission's 12 percent earning limitation and would still be capable of receiving NUSF support?

A. **Mr. Pursley: Yes. You know, the calculation of an EARN form for a company that has no facilities is very, very difficult to do. You know, the EARN form is really looking at kind of what your expenses, what your facilities are. You know, we are going to look at the EARN form process, post this proceeding, and ways we could look at that, and we'll certainly examine that. But, yes, the potential exists. I don't know for sure what the final recommendation will be on that aspect of it, though.**

August 25, 2004 Transcript pages 94-95, lines 16-25, 1-22. Commission Staff has suggested that a competitive ETC that leases unbundled loops to provide service may not have investments in a telephone network and therefore it may not be appropriate to apply the same earnings tests to incumbent LECs and loop-based competitive ETCs. Under Commission Staff's approach, there is the potential for inconsistent earnings calculation or unintended consequences when comparing earnings of different types of companies (ILECs, CLECs and wireless providers) under different types of earnings reviews. To avoid this potential result the Commission will need to address numerous parity issues involving the application of a NUSF earning test for competitive ETCs. To minimize the opportunity for competitive arbitrage, NUSF funding should be based on the same assumptions for two carriers competing in the same area. In the interim, until the NUSF-EARN Form process is fully re-evaluated, the Commission should apply the same earnings test criteria to all carriers seeking NUSF funding.

III. As the Commission Implements the New NUSF Program, Companies Should be Given the Flexibility to Use Alternative EARN Form Methodologies.

In Progression Order No. 5, the Commission stated that the final provision of NUSF support would be subject to an earnings test. Companies whose earnings exceed the Commission's established benchmark would have their NUSF support reduced by an amount equal to the amount of the earnings above the Commission earnings benchmark. The Commission indicated that it would continue to evaluate the use of the NUSF-EARN form currently filed by ETCs.

49. The Commission will continue to employ an earnings test to determine that NUSF support does not exceed the level required by NETC's to recover their costs. While, the Commission desires to develop a permanent earnings test, additional study is required for this development. Therefore, the Commission proposes the current earnings test obtained through the NUSF-EARN form continue to be utilized.

Progression Order No. 5 at 49.

At this stage of the proceeding, it remains unclear how the NUSF eligibility earnings test will ultimately be applied. It is clear however, that there will potentially be a two or more year lag between implementation of the new NUSF funding mechanism being considered by the Commission and the development application of a new NUSF-EARN Form methodology. Currently NETCs file their NUSF-EARN form for the prior calendar year on April 30th of the following year. Because of this timing, the NUSF-EARN Form filed on April 30th is used to determine NUSF eligibility for the following calendar year. For example, on April 30, 2003, NUSF-EARN forms for Year 2002 were filed with the Commission. These Year 2002 earnings results are used for NUSF purposes in calendar year 2004. Similarly, if the Commission implements a new NUSF funding mechanism in calendar year 2005, funding will be based on

calendar year 2003 earnings results. Staff has further indicated that the NUSF-EARN form would not be modified until after April 2005. Mr. Pursley explained:

- Q. Mr. Saville: Do you have any sense on what the timing on implementing any changes to the NUSF earnings form might be?
- A. **Mr. Pursley: You know, the practical effect of what we're doing today is that 2003, in all likelihood, will be the earnings period that we use when we roll into NUSF 26. The next period will be 2004. I don't -- I think it's unlikely, but I can't say never, but that it would be -- we didn't get -- we would be to the 2005 earnings periods before we would look at -- before we would have something in place, and in time, to the companies to be able to file their EARN forms with us. So I think we're probably talking, in all likelihood, something in the neighborhood of at least a year before we would have something in place. But, you know, there are so many things that will play into the timing of that, when we can open the docket, how fast we can get the docket completed. I don't envision it happening any sooner than a year, but I can't give you a date on that.**
- Q. Mr. Saville: So just to clarify, if this new funding program went into effect January 1st, 2005, is that what staff is envisioning at this point?
- A. **Mr. Pursley: That's what we would like to accomplish.**
- Q. Mr. Saville: So if the new funding program went into effect January 1st, 2005, the last NUSF form that you would have on file for companies would be for calendar year 2003?
- A. **Mr. Pursley: Yes.**
- Q. Mr. Saville: So what you have indicated is it's unlikely that the earnings form would be changed in time for the calendar year 2004 NUSF earnings filing, which, is that filed in June?
- A. **Mr. Pursley: Right now it's due, I believe, on April 30th.**
- Q. Mr. Saville: So it's unlikely that those changes to the NUSF form would be implemented by April 30th of 2005. So the 2004 earnings form would be, as is, today.
- A. **Mr. Pursley: I believe so. . . .**

August 25, 2004 Transcript pages 103-104, lines 10-25, 1-18. The practical effect of the delays in reviewing and modifying the NUSF-EARN form concurrent with the implementation of the

new NUSF program is that the existing NUSF-EARN form will be the basis for funding through 2006 - potentially the first two years of the new NUSF program. If the NUSF Form is modified in 2005, the first reporting using the new form would be on April 30, 2006 for calendar year 2005. These results would determine eligibility for calendar year 2006.

The Independent Rural Companies have suggested that since the Commission is changing the NUSF support methodology from a transitional mechanism to a permanent funding mechanism it would be appropriate to allow companies to re-elect the method they are using to calculate their earnings. Under the transitional NUSF mechanisms companies were required to elect one or three year averaging for calculating NUSF-EARN Form earnings and whether to calculate earnings on a company wide basis, state wide basis or on a supported services basis. Under the Independent Rural Companies proposal, at the inception of the permanent NUSF support mechanism, it would be appropriate to allow companies to alter the number of years over which they average earnings (one or three years) and/or the basis over which earnings are computed (total company, state only, or supported services). Rural Independent Companies witness Vanicek explained:

- Q. Mr. Saville: As I understand the Rural Companies' position, the Rural Companies think there should be some modification to the NUSF-EARN form, at least in terms of the methodology the Companies use for calculating their earnings?
- A. **Ms. Vanicek: Well, my understanding is that the Commission is planning on opening a proceeding to address this issue in the future. We're just suggesting, at this point in time, that since the Commission is changing the support methodology from what we refer to as the transitional mechanism to the permanent mechanism, that it might be wise to open up and allow companies to just reelect the way they're calculating their earnings because we're going into a new mechanism. My understanding is that the Commission will yet be making more changes to the EARN form, but we're just suggesting at this point in time that it would probably be nice to let the Companies reelect whether they want to do one- or three-year averaging and the particular jurisdiction over which they compute their earnings.**

Q. Mr. Saville: So, in other words, companies can make an election at the start of the 2000 -- of January, 2005, when this new mechanism goes in place, and ten down the road, if the Commission changes the EARN form, they would address whatever changes were made at that time?

A. **Ms. Vanicek: Yes, that's correct.**

August 26, 2004 Transcript, pages 36-37, lines 13-25, 1-11. Citizens supports the Independent Rural Companies' recommendation that at the outset of the new NUSF funding program, companies should be allowed to change their election regarding the methodology used to complete the NUSF-EARN Form. In assessing a Company's earnings for purposes of determining whether the Company is eligible for NUSF support under the new NUSF funding mechanism, the Company should be allowed to submit a NUSF form using the "supported services methodology" that includes only revenues and expenses associated with the services eligible for NUSF support. Interstate services and intrastate services that are not within the scope of NUSF supported services, and therefore the revenues and costs of these services, would not be considered in assessing a company's earnings for purposes of NUSF eligibility. Based on Mr. Pursley's testimony at the Hearing, it appears Commission Staff would not be opposed to this change in election:

Q. Mr. Saville: I also asked Ms. Vanicek about the Rural Independent Companies' proposal with respect to the NUSF-EARN form and the suggestion that the Commission allow companies to -- as a result of the implementation of this new plan, update the methodology they use for their NUSF-EARN form, either to do it on a company-wide basis, submit Nebraska-specific basis, or a service-specific basis. Is the staff receptive to considering that recommendation?

A. **Mr. Pursley: Well, we have always traditionally considered requests to do that, to change either the jurisdictional basis of the EARN form, or the time period, whether it's one or three years. It would remain my position that I would be of great concern if a company would seek to go from a state jurisdiction to a total federal jurisdiction, because that potentially puts the state -- the NUSF in a position of having to fund items that the FCC may undertake at the federal level, which not disputing the financial impact that**

those may have, I do not believe that it's the role of the NUSF nor is it within the NUSF ability to pick up dramatic changes that the FCC may do and, once again, try to leave the states holding the bag on. So with that said, in any company that seeks to go from a total company to a state-level jurisdiction, or from one-year to a three-year, I believe we would continue to support such a recommendation to the Commission. If companies would seek to go the other way, again, I said I would have some concerns that we would need to work through.

Q. Mr. Saville: And would the staff support doing that as part of or prior to the implementation of this new plan?

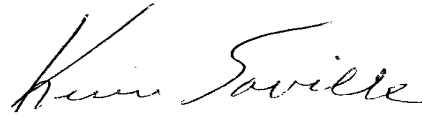
A. **Mr. Pursley: Yes. A company could ask at any point to change that, whether under the transitional mechanism or the permanent mechanism, and we would move forward with a recommendation to the Commission.**

August 26, 2004 Transcript pages 74-75, lines 7-25, 1-14. Citizens urges the Commission to allow companies to elect an alternative one year versus three year earnings period or a intrastate or supported services methodology for purposes of assessing eligibility for NUSF funding under the new NUSF funding mechanism.

CONCLUSION

The Commission should explain that existing Nebraska ETCs would retain their ETC designation and be eligible for NUSF support under the new NUSF program regardless of whether the NETC is or has previously received NUSF support. To minimize the opportunity for competitive arbitrage, NUSF funding should be based on the same assumptions for two carriers competing in the same area. Until the NUSF-EARN Form process is fully evaluated, the Commission should apply the same earnings test criteria to all carriers seeking NUSF funding. While the NUSF-EARN form is evaluated and potentially revised, Citizens urges the Commission to allow companies to elect an alternative one year versus three year earnings period or a intrastate or supported services methodology for purposes of assessing eligibility for NUSF funding under the new NUSF funding mechanism.

Respectfully submitted this 30th day of September 2004,

A handwritten signature in cursive script, reading "Kevin Saville".

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